

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 726 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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RATANJI GEMAJI MARWADI

Versus

STATE OF GUJARAT

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Appearance:

MR AY PATHAN for Petitioner

MR SR DIVETIA, APP for Respondent No. 1

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CORAM : MR.JUSTICE J.R.VORA

Date of decision: 06/05/98

ORAL JUDGEMENT

This appeal is filed by the original accused in Special Case No.35/89 of the Additional City Sessions Judge, at Ahmedabad acting as a Special Judge under the Essential Commodities Act, whereby the appellant-accused came to be convicted under section 7 for the breach of section 3 of the Kerosene (Restriction on Use and Fixation of Price) Order 1966 and sentenced to rigorous

imprisonment for three months.

Skeleton facts leading to the prosecution, briefly, can be mentioned as under:

On 30th September, 1988, Police Sub-Inspector (Traffic) Mr B.S.Ninama received information that rickshaws near Asarwa Chakla are running with fuel mixed with kerosene. Therefore, near Asarwa Chakla at about 10.50 he stopped one rickshaw bearing No.GRU-1277. One officer from Forensic Science Laboratory and one Police Constable Parvinsinh and other policemen were accompanying Mr Ninama. They took sample of fuel from the fuel tank of the above rickshaw and the Officer of the Forensic Science Laboratory examined the sample of fuel and prima facie came to the conclusion that the fuel is mixed with kerosene. Therefore, Mr Ninama called two panchas and in the presence of panchas, sufficient sample of fuel from the tank of above referred rickshaw was taken and was sealed. Signature of panchas were obtained on slip and was placed on the bottle of sample of fuel. Panchnama was drawn by the police in the presence of panchas regarding collecting of sample of fuel from the abovesaid rickshaw. Thereafter, Mr Ninama filed a complaint against the owner of the abovereferred rickshaw, i.e. the present appellant before the Shahibaug Police Station. The case, thereafter, was investigated by one Nareshkumar Harjivandas Patel, PSI, then working in Civil Police Station. A chargesheet for the offence under section 7 of the Essential Commodities Act for the breach of section 3 of the Kerosene (Restriction on use and fixation of Price) Order 1966 was submitted against the present appellant in the abovementioned Court. After recording evidence and after hearing both the parties, the learned Special Judge came to believe that the prosecution was able to prove the case against the accused, present appellant, and he was, therefore, sentenced to 3 months rigorous imprisonment for the breach of section 3 of the Kerosene (Restriction on use and fixation of Price) Order, 1966 as per section 7 of the Essential Commodities Act and hence this appeal.

Learned advocate Mr A.Y.Pathan on behalf of the appellant has submitted that while collecting the sample and sealing the bottle on the spot, on the slip which was attached with the sample bottle, no signature of the complainant was obtained and even then the complainant has deposed that he has signed the slip which was attached with the sample bottle along with the panchas. Mr Pathan submitted that this circumstance casts doubt on the prosecution case regarding the procedure followed by

the complainant in the presence of the panchas while collecting the samples of fuel. Mr Pathan further submitted that the prosecution has failed to prove that the same muddamal sample bottles which were seized by the Police on the spot were sent to the Forensic Science Laboratory for analysis and examination. Mr Pathan submitted that the so called offence took place on 30th September, 1988. As per Ex.13, letter of the Forensic Science Laboratory, the samples were received by them on 11th October, 1988. During this period, right from 30th September, 1988 to 11th October, 1988, sample bottles were in the possession of the police, seal which was stated to have been affixed on the sample bottles remained in possession of the concerned police. Thus, there was likelihood of tampering with the muddamal and hence it cannot be said that chemical analyzer of Forensic Science Laboratory examined the same fuel samples which were taken from the fuel tank of the abovesaid rickshaw from the spot. Mr Pathan further submitted that panchnama drawn by the complainant for seizing and collecting fuel from the tank of the rickshaw bears no date and therefore, the prosecution has failed to establish on which date this panchnama was executed and on which date the muddamal fuel was collected, which cast shadow of doubt on the prosecution case. Mr Pathan also submitted that as per the chemical analyzer report at Ex.13, in the results, it is mentioned that the exhibit found to be mixture of petrol and kerosene hydrocarbon considering the presence of lubricating oil. Mr Pathan argued that kerosene hydrocarbon is not kerosene warranting breach which is punishable under section 3 of the abovesaid order. The prosecution was required to prove beyond reasonable doubt that the fuel was mixed with kerosene and kerosene only and that kerosene hydrocarbon, according to Mr Pathan, is not kerosene. Mr Pathan has submitted that for the above referred circumstances, the prosecution has utterly failed to prove the case against the present appellant beyond reasonable doubt and the learned Special Judge has erred in convicting the appellant.

On the other hand, learned APP, Mr S.R.Divetia has supported the judgment of the learned Special Judge and hence submitted that the prosecution succeeded in proving the case against the accused beyond all reasonable doubt for the breach of section 3 of the Kerosene (Restriction on Use and Fixation of Price) Order, 1966 which is punishable under section 7 of the Essential Commodities Act.

Before dealing with the submissions of the

appellant's side one by one, the prosecution evidence is required to be seen and appreciated. The prosecution has tendered and examined three witnesses. First witness is PW 1, Bhimjibhai Shankarbhai at Ex.5 who is the complainant and Police Sub-Inspector, Traffic Branch at Ahmedabad. In support of his evidence, complaint Ex.6 which he had filed before the Shahibaug Police Station at Ahmedabad is produced. The second witness Natwarlal Gelaji has been examined by the prosecution as PW 2 at Ex.9 and he is the panch of panchnama at Ex.10. He was a panch in whose presence the complainant seized and collected the sample of fuel from rickshaw No.GRU-1277. In support, vide Ex.10, a panchnama is also produced by the prosecution. Last and third witness Nareshkumar Patel is examined as PW 3, Ex.12, who had investigated the offence. He was PSI, Civil Police Station at the relevant time. Muddamal was sent to Forensic Science Laboratory. The opinion is produced vide Ex.13. According to this opinion, muddamal fuel was found to be a mixture of petrol and kerosene hydrocarbon.

According to the complaint of PW 1, at the time when the rickshaw No.GRU-1277 was stopped, he was accompanied by an officer of Forensic Science Laboratory and other police constables. A sample of fuel was taken out from the fuel tank of the above rickshaw which was examined by the officer of Forensic Science Laboratory and prima facie it was found that the fuel was mixed with kerosene. Therefore, according to this complainant, two panchas were called and sufficient fuel samples were collected from the fuel tank of the abovesaid rickshaw in the presence of panchas. Fuel sample bottles were sealed and the slips signed by both the panchas were affixed on the muddamal bottle. Thereafter, he filed a complaint before the Shahibaug Police Station. Muddamal bottles were handed over to the Shahibaug Police Station. However on behalf of the appellant, no cross was conducted of this complainant and hence the evidence of this complainant remains unchallenged. PW 2 Natwarlal Gelaji has supported the panchnama at Ex.10 and has deposed that at the relevant time police in their presence collected samples of fuel from the fuel tank of rickshaw No.GRU-1277 which was sealed in their presence and a slip was attached on the bottle signed by both the panchas. In the cross-examination of this witness, a suggestion is placed that since he owns a pan shop, policemen normally goes to his shop for pan and deposits their things like packet etc. to his shop and therefore to oblige the Police, the witness has come for the deposition. The suggestion was denied by the witness and thereafter the Investigating Officer has been examined.

From the above evidence, it clearly transpires that the prosecution has succeeded beyond all reasonable doubt to prove that the complainant Bhimjibhai Shankarbhai on 30th September, 1988 at about 10.50 collected the samples from rickshaw No.GRU-1277 in presence of panchas. His evidence is unchallenged and there is nothing on record to disbelieve the creditworthiness of this witness. Likewise, another witness Natwarlal Gelaji has also fully supported the panchnama and the complainant.

Mr Pathan's contention that signature of the complainant is not available on the specimen bottle and therefore the prosecution case is doubtful cannot be accepted. What is required to be proved by the prosecution is whether at the relevant time, sample from the fuel tank of rickshaw No.GRU-1277 was obtained and seized or not. This fact is amply proved by the evidence of the complainant and panchas. They have deposed that this incident has taken place on 30th September, 1988 and since there is nothing on record to doubt their evidence, merely because the signature of the complainant is not available on specimen bottle or that the panchnama does not bear the date on which it was executed would not render the prosecution case doubtful. There is ample substantive evidence to prove that at which time and on what date the incident occurred and how the fuel samples were collected. As per the procedure, the complainant after obtaining fuel sample and sealing the same on the spot handed over the muddamal bottle to the Police Station. There is nothing in Ex.13, a letter of the Forensic Science Laboratory, which received the muddamal bottle, that the muddamal bottles were in any way tampered with. In these circumstances, it must be presumed unless otherwise proved that the official act was done by the official according to rules and law. Therefore the contention, that, because the seal was in possession of the Police Station and muddamal bottles also were with the Police Station, there was likelihood of tampering with the muddamal and hence the prosecution has not proved its case cannot be accepted. Nowhere it has even been suggested by the defence by way cross-examination that there was likelihood of tampering with the muddamal. On the contrary, by the evidence of the complainant and the Investigating Officer, PW 3 and vide Ex.13, it is proved beyond reasonable doubt that the same muddamal bottles were received by the Forensic Science Laboratory which were seized on the spot on 30th September, 1988. The complainant PW 1 was confronted with the muddamal bottles and he has deposed that those

muddamal bottles are the same which were seized and sent to the Forensic Science Laboratory. This part of the evidence has not at all been challenged by the defence and there is no reason to disbelieve this part of evidence. Hence the contention on behalf of the appellant that since the muddamal bottles were in possession of the police from 30th September to 11th October, 1988 and since the seal and muddamal were in possession of the Police, there was likelihood of tampering with the muddamal cannot be accepted.

Learned advocate Mr Pathan has raised the last contention that as per the report Ex.13 of chemical analyzer, what was found from the muddamal fuel sample was a mixture of petrol and kerosene hydrocarbon. Mr Pathan argued that the kerosene hydrocarbon is not kerosene and therefore there is no breach of section 3 of the Kerosene (Restriction on use and Fixation of Price) Order, 1966. In support of this contention, Mr Pathan has cited a judgment of the Hon'ble Supreme Court in the case of Behram Khurshid v. Bombay State, AIR 1955 SC page 123. It was a case under section 13(b) and 66(b) the Bombay Prohibition Act. Mr Pathan has drawn the attention of this Court to the observation of the Hon'ble Supreme Court in para 53 that "it is the duty of the prosecution to prove that the alcohol of which he was smelling came within the category of the prohibited alcohol". Mr Pathan has argued that it was the duty of the prosecution to prove that the fuel was mixed with kerosene. This contention also of Mr Pathan cannot be accepted for the simple reason that there is nothing on record to suggest that kerosene hydrocarbon is not kerosene as to warrant the breach of of section 3 of the aforesaid order. On the contrary, as laid down by the Hon'ble Supreme Court in the abovementioned case, the prosecution has beyond doubt proved that the fuel in the above said rickshaw was mixed with kerosene. There is nothing on record to show that kerosene and kerosene hydrocarbon are not the same thing mixing of which with fuel would result in prosecution under section 3 of the Kerosene (Restriction on use and fixation of Price) Order.

In view of the above discussion, the appellant has not succeeded to show anything to interfere with the judgment and order of the learned Special Judge in Special Criminal Case No.35/89.

In the result, the appeal fails and is dismissed. Appellant-accused since he is on bail, is directed to surrender in judicial custody within five weeks from

today failing which the trial court shall issue  
non-bailable warrant for the arrest of the appellant.

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(vjn)